APR 21 1967
JOHN F. DAVIS, CLERK
LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1966.

No. 1223.

RUTH S. WELLS,

Petitioner,

v.

CIVIL SERVICE COMMISSION OF PHILADELPHIA, PENNA.

and

FOSTER ROSER, Personnel Director of the City of Philadelphia,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

MATTHEW W. BULLOCK, JR.,
Second Deputy City Solicitor,
EDWARD G. BAUER, JR.,
City Solicitor,
Attorneys for Respondents.

1520 Municipal Services Building
Philadelphia, Penna. 19107

Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

The respondents, Civil Service Commission of the City of Philadelphia and Foster Roser, Personnel Director of the City of Philadelphia answer the Petition for Writ of Certiorari herein as follows:

The respondents submit that the issue herein is as follows:

Where Policemen and Policewomen are classified under the Philadelphia Civil Service System in different job classifications, and where the duties of Policemen and Policewomen are differently described (although there is some overlapping), is there a denial of equal protection under the law or of due process of law to a Policewoman, who is a candidate for promotion to Policewoman Sergeant, in view of the fact that candidates for the said position, as part of their promotional examination, are obliged to take an oral examination, whereas candidates for the job of Police Sergeant (male) are not required to take an oral examination as part of their promotional examination and where the difference in personnel procedure is based on the fact that the number of women candidates is very small whereas the number of men candidates is in the hundreds?

(Answered in the negative by the Court of Common Pleas of Philadelphia and the Supreme Court of Pennsylvania.)

The petitioner, in her Petition for Writ of Certiorari in this Honorable Court, fails clearly to set forth three important facts in this case which are recognized in the opinions both in the Court of Common Pleas of Philadelphia and the Supreme Court of Pennsylvania, to wit:

1. Policewoman Sergeant and Policeman Sergeant are two separate civil service positions under the Civil Service Regulations of Philadelphia so that the women candidates compete only against other women and the men candidates compete only against other men.

2. The job descriptions for the two positions are different and the actual duties of the two positions are different even though in some instances there may be an overlap.

3. The fact that Policewomen are required to take oral examinations as part of a promotional examination for Policewomen Sergeant whereas men candidates for promotion to Policemen Sergeant do not have to do so was not based upon the fact that the former were women and the latter were men, but was based upon the fact that the number of the former was very small as contrasted to the number of the latter and that, therefore, it was practical to take the small amount of time of police personnel required for oral examinations in the case of women, whereas it would have been impractical to do so in the case of men. (The record indicated that the female candidates for their last promotional examination could be orally examined in one day but the male candidates for their last promotional examination would require approximately 5½ weeks of the time of oral examiners.)

With reference to points 1 and 2 above, the Court of Common Pleas of Philadelphia, in its opinion, found as follows:

> "It is alleged in plaintiff's brief that the positions of male and female police sergeant are substantially identical. Defendant, however, documents what common sense would indicate—there are significant distinctions. Many of the tasks performed by the police force are of such a nature, physiologically speaking, that they cannot and should not be assigned to women. Using firearms, patrolling the highways, maintaining roadblocks, conducting raids, ferreting out dangerous criminals, quelling gang warfare and riots are just a few examples.
>
> "In addition, the job specifications of the police department list, inter alia, the following distinctions. Policewomen sergeants are required to have a knowledge of the functions of community and social welfare agencies, and of the social problems in urban centers,

particularly those which involve the delinquency of women and children. Also, they must have the ability to gain the confidence of adults and children having social and behavioral problems. Policemen sergeants are required to have a particular knowledge of the law of arrest and evidence, and of the principles and techniques of crime and accident investigation, interrogation and first aid.

"It is obvious that the differences in qualifications for the two jobs are such that one test could not suffice —there would have to be a different test for men and for women. . . ."

Similarly, the Supreme Court, in addition to quoting the above language from the Court below, further stated:

"In seeking promotion to the position of police sergeant, the men and women do not compete against each other. When a policeman sergeancy is vacant, the job will be filled from policemen; when a policewoman sergeancy is available, only policewomen qualify. Although policemen and policewomen wear the same kind of a badge, exercise the same governmental authority, their responsibilities and particular missions may be so dissimilar that to subject them both to precisely the same test might in itself be a demonstration of unfair treatment.

With reference to the third point, above, the Court of Common Pleas of Philadelphia found as follows:

"In the proper exercise of his administrative discretion, the personnel director took into consideration the practical aspects of conducting the examinations. At the most recent test date, there were 2,379 male and 25 female applicants. It would have taken 5 to 7 weeks to give each man an oral examination, yet all the women were examined in one day. It should be noted again the plaintiff's objection is not that the test is unfair, but that men seeking a comparable position take a different test."

This language was quoted by the Supreme Court of Pennsylvania in its opinion.

It should be emphasized that the petitioner policewoman in this case has never claimed that the maintenance of two separate job classifications for Policemen and Policewomen is a violation of the Equal Protection Clause of the United States Constitution. This would raise a very different and more basic question. It is submitted, however, that the same arguments supported by the Pennsylvania Courts herein would apply to such a contention: "Many of the tasks performed by the police force are of such a nature, physiologically speaking, that they cannot and should not be assigned to women." Moreover, it is submitted that good police administration involves a concern for public confidence in the police and there would seem little doubt that for certain types of assignments, particularly those involving more hazardous situations, the public's confidence in policewomen would be substantially less than its confidence in policemen.

There is no state law or local ordinance prohibiting discrimination based on sex. Moreover, the Federal law on the subject specifically does not apply to municipalities. See the Act of July 2, 1964, P. L. 88-352, Title VII, Section 701, 78 Stat. 253, 42 U. S. C. A. 2000e (b) (1).

On the contrary, Section 9 of the Pennsylvania Act of August 27, 1963, P. L. 1257, with reference to civil service examinations, specifically provides, inter alia:

> ". . . limitations as to age, *sex*, health, moral character, experience, and other qualifications may be specified in the rules of the commission and in the announcements of the examinations." (Emphasis supplied.)

It is settled that the equal protection clause operates fully to include women within its protective scope. But the Fourteenth Amendment does not interfere with a distinction based upon sex by creating a fictitious equality where there is a real difference. *Quong Wing v. Kirkendall*, 223 U. S. 59.

It is thus submitted that sex is not an unlawful basis of discrimination as far as employment is concerned and raises no federal question. However, it is further submitted that in the present case there is, in fact, no invidious discrimination, but merely a difference in personnel procedure based not on sex but on the respective numbers of candidates for the position of police sergeant (male) and policewoman sergeant.

WHEREFORE, the respondents pray that Your Honorable Court deny the Petition for Writ of Certiorari herein.

Respectfully submitted,

MATTHEW W. BULLOCK, JR.,
Second Deputy City Solicitor,
EDWARD G. BAUER, JR.,
City Solicitor,
Attorneys for Respondents.